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NO. 05-

IN THE SUPREME COURT OF THE
UNITED STATES

DAVIESS COUNTY, KENTUCKY
Petitioner

v.

NATIONAL SOLID WASTES MANAGEMENT
ASSOCIATION
Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In *C & A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383 (1994), this Court held that a "flow control" ordinance violated the dormant Commerce Clause. In *United Haulers Assoc., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245 (2nd Cir. 2001), the Court interpreted *Carbone* as applicable only if a state or local ordinance favored local private business interests over out-of-state interests. Based upon the interpretation of *Carbone* in the *United Haulers* case, which was not adopted by the Sixth Circuit here, the question presented is:

Whether Daviess County's ordinance, which directed all solid waste generated within Daviess County to be deposited in Daviess County's publicly owned landfill, violated the Commerce Clause.

RULE 29.6 STATEMENT

The Petitioner is a governmental body, and thus Rule 29.6 does not apply.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Daviess County, Kentucky, a political sub-division of the Commonwealth of Kentucky, respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Opinion of the Sixth Circuit Court of Appeals is reported as *National Solid Waste Management Ass'n v. Daviess County*, 434 F.3d 898 (6th Cir. 2006). Daviess County's Petition for Rehearing was denied in an Order and Opinion reported at 446 F.3d 647 (6th Cir. 2006).

The decision on appeal before the Sixth Circuit was rendered by the United States District Court, for the Western District of Kentucky. That court granted the respondent Summary Judgment in a decision that was unreported.

JURISDICTION

The Judgment of the Sixth Circuit was entered on January 24, 2006. Daviess County filed a timely Petition for

Rehearing. This Petition was denied in an Order entered March 30, 2006. The jurisdiction of the Sixth Circuit was pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). This Petition is timely filed, pursuant to Supreme Court Rule 13.3, as within ninety (90) days of the Order denying Daviess County's Petition for Rehearing.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Daviess County Ordinance KOC 830.5(2004) provides, in relevant part, that:

1. Daviess County Fiscal Court shall provide universal municipal solid waste collection within its jurisdiction through the grant of nonexclusive franchises.

2. All franchise agreements entered into under this ordinance shall require the party providing municipal solid waste collection service to dispose of the waste they collect at the Daviess County Landfill or Transfer Station.

3. Nonexclusive franchises shall be granted to all haulers that are properly registered in accordance with KRS 224.43-315(2), have properly

filed an annual report as required by KRS 224.43-315(3), and are in compliance with all other applicable laws and regulations.

4. No hauler shall be allowed to collect municipal solid waste in Daviess County unless granted by a franchise by Daviess County Fiscal Court.

5. For the purposes of this ordinance, Municipal Solid Waste shall mean Household Solid Waste and Commercial Solid Waste, as defined in KRS 224.01-010(31).

6. This ordinance shall become effective July 1, 2004, or 60 days following the issuance of a Declaratory Judgment upholding the ordinance by the United States District Court for the Western District of Kentucky, whichever is later.

Article 1, Section 8 of the U.S. Constitution provides in relevant part:

> The Congress shall have Power * * * To regulate Commerce * * * among the several States * * *.

STATEMENT

Daviess County is a political subdivision of the Commonwealth of Kentucky. Daviess County's Fiscal Court is responsible to "carry out governmental functions necessary for the operation of the county." Kentucky Revised Statute[1] 67.083(3). Pursuant to KRS 67.083(3)(o), Kentucky counties are given "exclusive management of solid waste by ordinance or contract or by both...".

As further set forth in KRS Chapter 109.011(6), the "primary responsibility" for solid waste "collection, management, treatment, disposal, and resource recovery" rests with the counties and solid waste management districts. KRS 109.011(11) further provides the counties with authority to develop a "solid waste management system for solid waste generated within the geographical borders of the county...". (Id.)

In KRS 109.041(1), counties are given the authority to, among other things, "construct and maintain solid waste facilities". This statute further provides that, in the "implementation, acquisition, financing, and maintenance of solid

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[1] Hereinafter "KRS".

waste management facilities, and in the enforcement of their use, counties will be performing state functions duly delegated to them for the public welfare." KRS 224.40-100(1) and KRS 224.40-305 require a permit, from the Commonwealth, for any solid waste disposal facility. Disposal of waste at any site or facility other than a permitted facility is prohibited. (Id.)

In accordance with the above cited authority, Daviess County implemented a comprehensive waste management program. This program included the construction and operation of a sanitary landfill, owned by the County, that was duly permitted by the Commonwealth of Kentucky in 1994. Prior to construction and operation of that landfill, Daviess County complied with the provisions of KRS 224.40-310, concerning the permit/application process itself with the Cabinet. Daviess County's landfill is the only state-permitted landfill in Daviess County.

In 2002, the Kentucky General Assembly enacted KRS 224.43-315. It required each county, including Daviess County, to provide a universal solid waste collection program "for all municipal solid waste generated within the county" by October 1, 2003. KRS 224.43-315(1) It also required

that all persons providing solid waste collection services to register annually with the counties in which they provide the service and, further, to provide information regarding the amount of waste collected. The county is then required to submit an annual report to the Cabinet[2] "detailing its solid waste collection activities...".

In accordance with the above statutory obligations and mandates, Daviess County enacted Ordinance KOC 830.5 on February 19, 2004. The Ordinance provides that the Fiscal Court "shall provide universal municipal solid waste collection within its jurisdiction through the grant of non-exclusive franchises." The franchise agreements required any party providing solid waste collection to "dispose of the waste they collect at the Daviess County Landfill or Transfer Station." All such haulers had to be properly registered, in accordance with KRS 224.43-315, including filing the required reports. The Ordinance further provided that no hauler could collect solid waste in Daviess County except pursuant to the registration provisions of the Ordinance. The Ordinance was effective July 1, 2004, or 60 days following a

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[2] The "Cabinet" is the "Natural Resources & Environmental Cabinet."

declaratory judgment upholding the Ordinance by the United States District Court, whichever date was later.

National Solid Waste Management Association ("NSWMA") is a trade association, representing the interests of the solid waste disposal industry. As part of its Complaint in the District Court, it alleged membership organizations in all 50 states, including Republic Services of Kentucky, LLC. NSWMA alleged that Republic was engaged in the collection, transportation, and disposal of solid waste generated in Daviess County, Kentucky.

Republic of Kentucky, LLC, doing business as B&J Sanitation, and 15 other haulers, properly registered with Daviess County under this Ordinance. B&J Sanitation deposits solid waste that it collects in Daviess County in a Republic-owned landfill in Kentucky. None of the other haulers in Daviess County deposit their solid waste in a landfill outside of Kentucky.

NSWMA filed its suit, seeking to declare Daviess County's Ordinance unconstitutional, on March 29, 2004. It contended that Daviess County's Ordinance, which mandated that all solid waste collected within Daviess County must be deposited in Daviess County's publicly owned and financed

landfill, discriminated against the "interstate market for solid waste disposal services by favoring disposal facilities owned by Daviess County and located in Daviess County over facilities owned by NSWMA members both inside and outside of Daviess County". NSWMA contended that Daviess County had other means, besides its Ordinance, to advance its legitimate interest in solid waste disposal.

Daviess County contended that its Ordinance was facially neutral. Further, since it financed, owned, and maintained its own landfill, no dormant Commerce Clause discrimination occurred because its ordinance did not favor any local private business entity over any non-local, or interstate disposal facility. Daviess County further claimed that its Ordinance took over the disposal market for solid wastes , but did not affect the collection market for solid wastes. As such, Daviess County contended that its Ordinance was facially valid and did not unduly burden interstate commerce.

In a Memorandum Opinion and Order, along with a companion Judgment entered the same date of November 19, 2004, the District Court for the Western District of Kentucky granted NSWMA's motion for summary judgment. The District Court determined that Daviess County's Ordinance

facially discriminated against interstate commerce. The District Court declared the ordinance unconstitutional and enjoined its enforcement. Daviess County then appealed to the Sixth Circuit.

The Sixth Circuit upheld the District Court in all respects. Daviess County now requests that this Court review the decision of the Sixth Circuit.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S OPINION CONFLICTS WITH THE DECISION OF THE SECOND CIRCUIT IN THE UNITED HAULERS CASE THAT *CARBONE* IS LIMITED ONLY TO FLOW CONTROL LAWS THAT BENEFITTED A PRIVATE ENTITY BUT THAT THE COMMERCE CLAUSE IS NOT VIOLATED IF THE DISPOSAL FACILITY IS OWNED BY A STATE OR LOCAL GOVERNMENTAL ENTITY.

In *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994), this court invalidated a town ordinance that required all solid waste generated within that town to be disposed of at a transfer station built and operated by a local contractor. The contractor was then to sell the facility to the town after five years for a nominal price. Carbone, a waste recycler, was shipping waste to a landfill in another state.

This Court determined that the town's ordinance discriminated in favor of a "single local proprietor" and was thus unconstitutional under the Commerce Clause. Because the ordinance was determined to be facially invalid, the court did not find it necessary to reach the *Pike*[3] "balancing" test.

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3 *Pike v. Bruce Church, Inc.* 397 U.S. 137 (1970)

Courts have not interpreted *Carbone* as imposing a "per se" law on any law that established flow control for solid waste. Under a variety of legal theories, ordinances which directly, or indirectly, establish some form of flow control have been upheld against challenges based upon *Carbone*. See: *USA Recycling v. Town of Babylon*, 66 F.3d 1272 (2nd Cir. 1997) *Cert denied* 517 U.S. 1135 (1996); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3rd Cir. 1995); *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178 (1st Cir. 1999); and indirectly in *Maharg, Inc. v. VanWert Solid Waste Management District*, 49 F.3d 544 (6th Cir. 2001) *Cert denied* 534 U.S. 1079 (2002).

Other circuits declined to uphold such laws, claiming they ran afoul of Carbone's interpretation of the Commerce Clause. Some of these cases are even within the same circuits that, as identified above, upheld flow control laws under other circumstances. See: *SSC Corp v. Town of Smithtown*, 66 F.3d 502 (2nd Cir. 1995); *Ben Oehrleins & Sons & Daughter v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1997); *Waste Management, Inc. of Tennessee v. Metropolitan Government of Nashville and Davidson*

County, 130 F.3d 731 (6th Cir. 1997) *cert denied* 523 U.S. 1094 (1998); and *Huish Detergents, Inc. v. Warren County*, 214 F.3d 707 (6th Cir. 2000).

In *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 261 F.3d 245 (2nd Cir. 2001), *cert. denied* 534 U.S. 1982 (2002), ("United Haulers I")[4] the court reviewed dormant Commerce Clause decisions and determined that the "common thread of Commerce Clause jurisprudence was that the local law discriminates against interstate commerce when it hoards local resources in a manner that favors local business, industry or investment over out-of-state competition." (261 F.3d at p. 261, emphasis in original). The court went on to hold that a "flow control ordinance governing the processing of waste is not discriminatory under the Commerce Clause unless it favors local private business interest over out-of-state interest."(*Id.*, p. 263).

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[4] Following remand for purpose of the *Pike* test, the case was then affirmed on that ground. *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 438 F.3d 150 (2nd Cir. 2006). ("United Haulers II".)

This conclusion amplified its earlier determination that a "municipal flow control law does not discriminate against out-of-state interests in violation of the Commerce Clause when it directs all waste to publically owned facilities." (261 F.3d at p. 257)

United Haulers I was followed in *East Coast Recycling, Inc. v. City of Port St. Lucie*, 234 F.Supp.2d 1259 (So. D. Fl. 2002). But United Haulers I was rejected in *National Solid Waste Management Ass'n v. Pine Belt Solid Waste Management Authority*, 261 F.Supp. 2d 644 (S. D. Miss. 2003) *rev'd in part on other grounds in* 389 F.3d 491 (5th Cir. 2004).

Following the Second Circuit's affirmance of United Haulers I in United Haulers II, the commercial haulers in that case have now petitioned this Court for a Writ of Certiorari. This is pending as Case No. 05-1345, filed April 21, 2006.

In reviewing Daviess County's arguments that the Court should recognize the public/private ownership distinction of *United Haulers*, the Sixth Circuit declined to do so. Although it acknowledged that its prior cases within the Circuit had not directly addressed this issue, it nonetheless held that a "necessary implication" of its prior decision was

that "public ownership did not change the dormant Commerce Clause inquiry." (434 F.3d at p. 910) Further, the Sixth Circuit also disagreed with the analysis of the Second Circuit in the *United Haulers* decision.

Pursuant to Supreme Court Rule 10(a), Daviess County submits that the Sixth Circuit Opinion entered below is in conflict with the Second Circuit Opinion in the United Haulers I. The respective courts have come to different conclusions on whether a law, enacted by a state or local governmental entity, runs afoul of the dormant Commerce Clause if it directs solid wastes to a publicly owned facility for transfer or disposal. This split in Circuits presents an important federal question on the interpretation of the dormant Commerce Clause. Resolving the splits in Circuits will provide guidance to the lower federal courts, as well as to the state courts, and state and local governments.

CONCLUSION

For all of the above reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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APPENDIX

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App. Page(s)

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Order and Opinion of the Court Denying Petition for
Rehearing of March 30, 2006 .....App. pp.28-35

United States Court of Appeals,Sixth Circuit.
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, Plaintiff-Appellee,
v.
DAVIESS COUNTY, KENTUCKY, Defendant-Appellant.
No. 04-6498.

Argued: Nov. 29, 2005.
Decided and Filed: Jan. 24, 2006.
Rehearing En Banc Denied March 30, 2006.

Before: CLAY and COOK, Circuit Judges; COOK, District Judge. FN*

FN* The Honorable Julian A. Cook, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION

CLAY, Circuit Judge.

Defendant Daviess County, Kentucky appeals the November 19, 2004 order of the United States District Court for the Western District of Kentucky granting summary judgment for Plaintiff National Solid Wastes Management Association ("NSWMA"), declaring proposed Daviess County Ordinance 830.5 ("Ordinance") unconstitutional, and enjoining the County from enforcing the terms of the Ordinance. For the reasons set forth below, this Court AFFIRMS the district court order.

I. BACKGROUND

A. PROCEDURAL HISTORY

On March 25, 2004, Plaintiff filed a complaint against Defendant that sought a declaratory judgment that the Ordinance was unconstitutional because it violated the dormant

Commerce Clause and a permanent injunction barring Defendant from enforcing the Ordinance against Plaintiff's members.

Both parties filed motions for summary judgment.

On November 19, 2004, the district court granted Plaintiff's motion for summary judgment, denied Defendant's motion for summary judgment, issued a declaratory judgment that the Ordinance was unconstitutional, and issued a permanent injunction barring Defendant from enforcing the terms of the Ordinance.

On December 17, 2004, Defendant timely filed a notice of appeal.

B. FACTS

The facts are not in dispute. Defendant is a county located in Kentucky. Under Kentucky law, Defendant is responsible for developing and implementing solid waste management plans for the county. Ky.Rev.Stat. Ann. § 109.011(9) (West 2005). Pursuant to this responsibility, Defendant enacted the Ordinance on February 19, 2004. The Ordinance states, in relevant part:

1. Daviess County Fiscal Court shall provide universal municipal solid waste collection within its jurisdiction through the grant of nonexclusive franchises.
2. All franchise agreements entered into under this ordinance shall require the party providing municipal solid waste collection service to dispose of the waste they collect at the Daviess County Landfill or Transfer Station.
3. Nonexclusive franchises shall be granted to all haulers that are properly registered in accordance with KRS 224.43-315(2), have properly filed an annual report as required by KRS 224.43-315(3), and are in compliance with all other applicable laws and regulations.

4. No hauler shall be allowed to collect municipal solid waste in Daviess County unless granted a franchise by Daviess County Fiscal Court.

Plaintiff is a trade association whose members are "engaged in various aspects of solid waste management, including the collection, transportation and disposal of municipal solid waste generated in Daviess County." (J.A. at 8.) One of these members is Republic Services of Kentucky, LLC ("Republic"). Republic currently conducts business in Daviess County as a waste collector, and it disposes of this waste either at Plaintiff's transfer station or at a Kentucky landfill owned by Republic. Plaintiff claims that its members operating within Daviess County as waste collectors may need to dispose of waste in the future at out-of-state disposal sites. Plaintiff also claims that its members who operate out-of-state waste disposal sites will be unable to participate in the waste disposal market for Daviess County.

II. DISCUSSION

A. STANDING

This Court has an independent obligation to determine whether it has subject matter jurisdiction over a case, including whether Plaintiff meets the requirements of constitutional and prudential standing. *In re Cannon*, 277 F.3d 838, 852 (6th Cir.2002). This Court reviews these standing issues *de novo*. *Id.* (citing *Johnson v. Econ. Dev. Corp. of County of Oakland*, 241 F.3d 501, 507 (6th Cir.2001)).

1. Constitutional Standing

Under Article III, Plaintiff must demonstrate three components to establish standing: "(1) an injury in fact that is actual or threatened; (2) a causal connection between the defendants'

conduct and the alleged injury; and (3) a substantial likelihood that the injury will be redressed by a favorable decision." *Huish Detergents, Inc. v. Warren County*, 214 F.3d 707, 710 (6th Cir.2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

We find that Plaintiff has established constitutional standing. With respect to the first element, NSWMA members who are waste collectors in Daviess County would be prohibited from contracting with less expensive waste disposal sites under the Ordinance; in fact, member Republic, a waste collector in the county, also owns a waste disposal facility that it would be unable to use. Moreover, NSWMA members who own waste disposal sites cannot contract with waste collectors for disposal of solid waste that is generated within Daviess County. Thus, the Ordinance would work an actual injury on NSWMA members. With respect to the second element, a causal connection exists between Defendant's conduct and the injury; without the Ordinance, NSWMA members would be free to contract to dispose of waste at sites other than the County-owned disposal site or transfer station. With respect to the third element, a favorable decision would redress Plaintiff's injury, as an injunction against the enforcement of the Ordinance would allow NSWMA members to freely contract for waste disposal services.

2. Prudential Standing

In addition to the Article III requirements, Plaintiff must prove prudential standing; specifically, Plaintiff must demonstrate that the interest that it seeks to protect is " 'within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.' " *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997)). Here, Plaintiff claims Defendant's Ordinance is in violation of the dormant Commerce Clause.

The Supreme Court has explained that "[t]he central rationale for the rule against discrimination [under the dormant Commerce Clause] is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 390, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994).

We find that Plaintiff has met the prudential standing requirement. This Court has specifically held that the Commerce Clause protects a party's right to contract with an out-of-state waste disposal provider.[FN1] *Huish Detergents*, 214 F.3d at 711 ("In making this claim, [the plaintiff] is asserting its individual right ... to purchase waste processing and disposal services across State boundaries, an interest that falls squarely within the zone of interests protected by the Commerce Clause.")

FN1. The fact that Plaintiff has not shown that waste generated within Daviess County has actually crossed state lines is of no import with respect to prudential standing; the Commerce Clause protects the right to contract across state lines, not just the actual movement of goods or services across state lines. *See Huish Detergents*, 214 F.3d at 710-11. While one other circuit has seemingly required such actual movement, *see Nat'l Solid Waste Mgmt. Assoc. v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 498-501 (5th Cir.2004), the law of this Court recognizes prudential standing where the plaintiff seeks to protect its right to contract for or purchase out-of-state goods or services.

B. THE DISTRICT COURT DID NOT ERR WHEN IT FOUND THAT THE ORDINANCE WAS FACIALLY DISCRIMINATORY AGAINST INTERSTATE COMMERCE

1. Standard of Review

This Court reviews the district court's grant of summary judgment *de novo*. Odle v. Decatur County, 421 F.3d 386, 389 (6th Cir.2005) (citation omitted). The moving party must show "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court "must view all the facts and the inferences drawn therefrom in the light most favorable to the nonmoving party." *Cummings v. City of Akron*, 418 F.3d 676, 682 (6th Cir.2005) (internal quotations and citation omitted).

2. Analysis

The district court did not err when it found that the Ordinance was facially discriminatory against interstate commerce. The Ordinance, in practical terms, is no different than other local laws struck down by the Supreme Court and this Court as unconstitutional.

a. Legal Framework

The United States Constitution gives Congress the power to "regulate Commerce ... among the several States." U.S. Const. art. 1, § 8, cl. 3. While the Constitution does not directly speak to the states' power to regulate commerce amongst themselves, the Supreme Court has long interpreted the Constitution as not only granting power to Congress to regulate interstate commerce, but also denying that same power to the states. *See generally* Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 6 L.Ed. 23 (1824); *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 69 S.Ct. 657, 93 L.Ed. 865 (1949). As a result, this "dormant" Commerce Clause "limits the actions of municipalities ... where such actions 'burden interstate commerce or impede its free flow.' " FN2 *Waste Mgmt., Inc. v. Metro. Gov't.*, 130 F.3d 731, 735 (6th Cir.1997)

(quoting *Carbone*, 511 U.S. at 389, 114 S.Ct. 1677).

FN2. The dormant Commerce Clause must still be considered even in cases where there is a substantial local interest, as explained *infra*. *Amici* spend the majority of their brief extolling the virtues of flow control regulations in today's complex waste management landscape; however, the practicality of a regulation is hardly sufficient to correct its unconstitutional nature. Furthermore, if *amici* believe that the dormant Commerce Clause should not apply in the waste management context, *amici* need not endure the burden of constitutional amendment to achieve their ends; they can simply petition Congress, as Congress may approve of state and local regulations of interstate commerce.

By its nature, the dormant Commerce Clause only disallows local *regulation* of interstate commerce. If a local government action is market participation, as opposed to market regulation, then the action is not barred by the dormant Commerce Clause. *Huish Detergents*, 214 F.3d at 714. We agree with the Second Circuit that the proper inquiry to determine if a local government is engaged in market regulation is if "it exercises governmental powers that are unavailable to private parties.... Classic hallmarks of government regulation include the threatened imposition of fines and/or jail terms to compel behavior." *United Haulers Assoc., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 255 (2d Cir.2001) (citation omitted).

If the local government meets this threshold inquiry and is engaged in regulation of interstate commerce, then the Court must determine whether the regulation discriminates against interstate commerce, or whether it "regulates evenhandedly." *Huish Detergents*, 214 F.3d at 712-13. "If an ordinance discriminates against interstate commerce by treating in-state and out-of-state interests differently, benefitting the former

and burdening the latter, it is *per se* invalid unless the State has 'no other means to advance a legitimate local interest.' " *Id.* (quoting *Carbone*, 511 U.S. at 392, 114 S.Ct. 1677). "On the other hand, if the law regulates evenhandedly, it will be upheld unless the burden it imposes on interstate commerce is 'clearly excessive in relation to the putative local benefits.' " *Id.* at 713 (quoting *Carbone*, 511 U.S. at 390, 114 S.Ct. 1677.) This is known as the *Pike* balancing test. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

With this framework in mind, this Court addresses three relevant waste management cases. In *C & A Carbone v. Clarkstown,* the Supreme Court addressed the constitutionality of a town ordinance. There, the town of Clarkstown decided to build a waste transfer station, as it closed its local landfill in cooperation with the State of New York. 511 U.S. at 387, 114 S.Ct. 1677. The transfer station's purpose was to receive bulk solid waste, separate the waste between recyclable and nonrecyclable waste, and process these two types of waste for transport to the appropriate ultimate disposal destinations. *Id.*

The town hired a private contractor to build the transfer station. *Id.* Instead of paying for the transfer station with municipal funds, the town gave the private contractor the right to operate the station for five years. *Id.* At the end of the five years, the private contractor would sell the transfer station to the town for a nominal amount. *Id.* The town also guaranteed a minimum waste flow of 120,000 tons, and the town authorized the private contractor to charge a "tipping fee" of $81 per ton. *Id.* If the actual waste flow was less than 120,000 tons, the town would pay for the difference in revenues. *Id.*

In order to make good on its guarantee to the private contractor, the town passed an ordinance that required all nonhazardous solid waste from the town to be brought for processing to the transfer station. *Id.* The plaintiff, a recycling center in the

town, brought suit. *Id.* at 387-88, 114 S.Ct. 1677.

The Supreme Court found that the ordinance was unconstitutional. The Court held that the ordinance discriminated against interstate commerce, because "[i]t hoard[ed] solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility." *Id.* at 392, 114 S.Ct. 1677. In other words, without the ordinance, waste collectors would be free to take the waste to any number of transfer and disposal sites, including out-of-state sites. The ordinance thus "deprive[d] out-of-state businesses of access to a local market." *Id.* at 389, 114 S.Ct. 1677. The court found that the case did not fall into a narrow exception "in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Id.* at 392, 114 S.Ct. 1677.

In *Waste Mgmt., Inc.*, this Court followed the Supreme Court's lead in *Carbone*. There, the county enacted a "flow-control" regulation that required, among other things, that all residential waste collected within the county be disposed of at a "waste-to-energy" facility owned by the county. 130 F.3d at 733. This Court found *Carbone* to be directly on point and held that the regulation discriminated against interstate commerce, and that the county could have engaged in alternative, nondiscriminatory actions to meet its proffered local concerns. *Id.* at 736.

In *Huish Detergents, Inc. v. Warren County*, the Court had a second opportunity to address a flow-control regulation. There, the county solicited competitive bids for the collection and processing of all municipal solid waste in Bowling Green, Kentucky. 214 F.3d at 708. Under the agreement, the contractor would have the exclusive right to collect solid waste for five years. *Id.* The city would not directly pay the contractor; instead, all entities generating solid waste were

required to use the contractor, and the contractor would collect its payment from these customers. The contractor was required to operate the city's transfer station and process all of the solid waste collected at the transfer station. *Id.* at 708-09. Finally, the contractor was required to dispose of all waste at a landfill approved and permitted by the state, "effectively prohibiting the use of out-of-state disposal sites." *Id.* at 709. After selecting the contractor, the county passed an ordinance that executed the agreement. *Id.*

This Court found the ordinance to be unconstitutional. With respect to the requirement that the contractor process all of the solid waste at the transfer station, the Court rejected the defendant's market participation argument. The defendant argued that because it was a market participant in that it was procuring waste collection services for one of its cities, it was exempt from the strictures of the dormant Commerce Clause, and could thus force the contractor to use a single transfer station. *Id.* at 715. This Court disagreed and ruled that the county was neither purchasing nor selling products or services. Instead, it was forcing all of the inhabitants of a city to purchase services from a contractor, a power that "far exceeded that which a private entity could accomplish on the free market." *Id.* at 716. Disposing of the defendant's market participation argument, the Court then ruled that the ordinance was the "functional equivalent" as the one in *Carbone,* in that it required processing services at the city's transfer station and "nowhere else." *Id.* The ordinance thus discriminated against interstate commerce; the Court further found that the ordinance did not fall into the narrow exception based on local interests. *Id.*

With respect to the requirement that the contractor dispose of the solid waste at an in-state site, the Court found that *Carbone* was equally applicable; the ordinance "violated the Commerce Clause by prohibiting out-of-state disposal." *Id.* at 716. Interestingly, the Court stated in dicta that even if the

defendant were a market participant with respect to the collection or processing of waste, it could not regulate the downstream market of waste disposal.FN3 *Id.*

FN3. We agree that the defendant could not *regulate* the waste disposal market if it were only a market participant in the waste collection or processing markets; however, it could make a decision as a market participant that would duplicate the results of regulation. For example, if the defendant operated the transfer station as a market participant, it could choose where it ultimately disposed of the waste, such as an in-state disposal site.

Lastly, the Court readdressed the defendant's market participation argument. The Court found that had the defendant actually purchased the contractor's services with its own funds, it could have avoided scrutiny under the dormant Commerce Clause. *Id.* at 717. But by deciding to regulate the market, by forcing city residents to purchase the contractor's services, instead of participating in the market, the defendant "opened itself up" to such scrutiny. *Id.* Moreover, the fact that the defendant could have acted as a market participant to achieve the same ends did not save its ultimate decision to regulate the market in violation of the dormant Commerce Clause. *Id.* (quoting *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 98-99, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984) (plurality opinion)).

b. Application to This Case

The three cases cited above leave little doubt that the Ordinance in this case discriminates against interstate commerce. By forcing Plaintiff's members to use Defendant's disposal and transfer facilities, the Ordinance would prohibit these members from using other in-state and out-of-state facilities. The Ordinance is thus facially discriminatory against out-of-state interests.FN4

FN4. Defendant does not argue that it has no other means to advance a local interest; it only argues that the Ordinance is nondiscriminatory.

In response, Defendant makes a strange argument: "[Defendant] contends that its Ordinance affects both in-state and out-of-state entities the same. All haulers of solid waste that is generated in Daviess County must deposit waste in Daviess County's publicly owned landfill." (Def.'s Br. 15.) As Plaintiff points out, there is a difference between the market for waste collection and for waste disposal. We agree that the Ordinance does not discriminate against out-of-state waste collectors; however, that is not the point. The Ordinance discriminates against out-of-state waste disposal facilities, and this is dispositive with respect to this issue.

Defendant's argument that the Ordinance does not create a "bottleneck" also lacks merit. Defendant attempts to distinguish *Carbone* in that *Carbone* involved a waste transfer station, and the Ordinance here involves a waste disposal facility. Defendant's contention is that "[w]hen solid waste is delivered to a landfill for disposal, it is no longer in the stream of commerce." (Def.'s Br. 17.) This argument fails for two reasons. First, this Court has already held that *Carbone* applies to waste disposal facilities. *See* *Waste Mgmt.*, 130 F.3d at 736; *Huish Detergents*, 214 F.3d at 716. Second, *Carbone* is as applicable to disposal facilities as it is to transfer stations because "what makes garbage a profitable business is not its own worth but the fact that its possessor must pay to get rid of it. In other words, the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it." *Carbone*, 511 U.S. at 390-91, 114 S.Ct. 1677. In other words, the focus is not on the actual waste and its location in the steam of commerce; the focus is on the attendant services and whether the Ordinance constricts the open channels of commerce to these services. Here, the Ordinance does exactly that: by

requiring disposal at Defendant's facility, out-of-state disposal service providers are shut out of the disposal market for waste generated in Daviess County.

Defendant's citations to purportedly analogous case law are likewise unconvincing and merit only a brief response. Defendant cites to *Maharg, Inc. v. Van Wert Solid Waste Mgmt. Dist.* for the proposition that the Ordinance is facially neutral. In that case, Ohio law authorized the county waste management board to make "facility designations." 249 F.3d 544, 547 (6th Cir.2001). This authorization "allow[ed] the board to 'designate solid waste disposal, transfer, or resource recovery facilities ... where solid wastes generated within or transported into the district shall be taken for disposal.' " *Id.* (quoting Ohio Rev.Code Ann. § 343.014(A)). Van Wert County then adopted a resolution whereby it solicited bids from in-state and out-of-state waste facilities to become "designated" facilities. *Id.*

This Court upheld the resolution because it was not "territorially based," as the bidding process was equally open to in-state and out-of-state waste facilities. *Id.* at 551. The Ordinance in this case does not open the waste disposal market equally to in-state and out-of-state interests; it closes the market to all except Defendant's waste disposal facility. Thus, there is not even a remote analogy to be drawn between *Maharg* and the instant case.

Eastern Kentucky Res. v. Fiscal Court of Magoffin County is also inapposite. There, this Court upheld Kentucky statutes that required local governments to create solid waste management plans for municipal solid waste and to identify any additional capacity for "out-of-area" solid waste. 127 F.3d 532, 541 (6th Cir.1997) (quoting Ky.Rev.Stat. Ann. § 224.43-345(1)(*l*)). The Court found that although the statute distinguished between in-area and out-of-area waste, the statute did not provide for different treatment between the two

categories. *Id.* In this case, there is an absolute difference in treatment; the Ordinance completely disallows out-of-state waste disposal services.

Finally, Defendant relies on the district court case of *Nat'l Solid Wastes Mgmt. Assoc. v. Granholm*. There, the plaintiff contested the legality of a set of Michigan statutes that created disposal requirements for Michigan landfills. 344 F.Supp.2d 559, 563-64 (E.D.Mich.2004). Under the statutes, solid waste generated in Michigan automatically qualified for disposal in Michigan landfills, whereas solid waste generated in other states did not automatically qualify, but instead required additional procedures. *Id.* The district court found that the statutes "contain no overt distinctions between in-state and out-of-state waste, nor do they expressly bar the entry of out-of-state waste into Michigan;" as a result, the statutes were facially neutral. *Id.* at 566. The Ordinance in this case, on the other hand, expressly bars out-of-state waste disposal providers from the Daviess County waste disposal market.

C. THE DISTRICT COURT DID NOT ERR WHEN IT FOUND THAT DEFENDANT DID NOT ELIMINATE THE DISPOSAL MARKET FOR SOLID WASTE

1. Standard of Review

The standard of review for the district court's grant of summary judgment is set out above.

2. Analysis

a. Legal Framework

Defendant's argument with respect to this issue centers entirely around the Second Circuit case of *USA Recycling, Inc. v. Town of Babylon.* In that case, the town built an incinerator as a waste disposal facility. 66 F.3d 1272, 1277 (2d Cir.1995).

The town raised funds via local bonds and hired a private contractor to build the incinerator. *Id.* The private contractor then leased the incinerator from the town, and the town paid the private contractor to operate the facility. *Id.*

Originally, the town passed a flow control ordinance that required all solid waste collected from the town to be disposed of at the town incinerator. *Id.* at 1278. In the wake of *Carbone,* the constitutionality of that practice was in great doubt. *Id.* In response, the town decided to purchase commercial waste collection services from one provider by utilizing a competitive bidding procedure open to in-state and out-of-state waste collection service providers. *Id.* at 1278-79. The key fact is that the town paid for the waste collection services itself; it did not force its commercial residents to purchase the services from the winning bidder. *Id.* The town passed on the cost by assessing an "annual benefit assessment" against each benefitted commercial parcel. *Id.*

In conjunction with this new policy for waste collection, the town also allowed the waste collector to dispose of 96,000 tons of solid waste per year at the incinerator for no charge. *Id.* If the waste collector disposed of more than this amount at the incinerator, the waste collector would be forced to pay the market rate at the incinerator for waste beyond this amount. *Id.* The contract also had a provision that gave the town the right to direct the waste collector to the disposal site of its own choice, but then the town would have to pay the disposal fee. *Id.*

The plaintiffs filed suit against the town, challenging both the waste collection and the waste disposal provisions of the contract. *Id.*

With respect to the waste collection aspect of the contract, the Second Circuit found that the town acted both as a market participant as it purchased waste collection services, and as a

market regulator, as it prevented any other entity from providing waste collection services other than the single contractor selected. *Id.* at 1282. Because the town effectively entered into regulation of the waste collection market, the court undertook the dormant Commerce Clause analysis.

The court found that the contract did not discriminate against interstate commerce. It found that:

No one enjoys a monopoly position selling garbage collection services in Babylon's commercial garbage market, because the Town has eliminated the market entirely. Not even the Town itself remains as a *seller* in the market. Although the Town is now the lone *provider* of garbage collection services in the District, it does so as a local government providing services to those within its jurisdiction, not as a business selling to a captive customer case.... In Babylon, local businesses do not buy services from anyone.... Although taxpayers in the District ultimately foot the bill for these garbage services-just as they foot the bill for street sweeping, street lighting, sewage treatment, public schools, and police and fire protection, to name just a few other basic services provided by local governments-the payment of taxes in return for municipal services is not comparable to a forced business transaction .... In short, because Babylon is not selling anything, it cannot be considered to be a favored single local proprietor as in *Carbone.*

Id. at 1283 (emphasis supplied). Instead of forcing its mmercial residents to purchase waste collection services from a single provider, the town eliminated the market in the sense that the commercial residents no longer purchased waste collection services, and waste collection service providers no longer sold these services to the commercial residents. The town paid for the service itself, and then passed the cost on to its commercial residents.

With respect to the waste disposal aspect of the contract, the court found that the town could legally offer free disposal services to its selected waste collection provider, because it was a market participant. The town owned the incinerator; moreover, it paid a private contractor to operate the incinerator; in essence, the town had "exclusive rights to dispose of waste [at the incinerator]." *Id.* at 1288-89. As the court viewed the situation,

[t]he Town may exercise [its waste disposal] rights as it sees fit. It could sell those rights on the open market.... Instead, the Town has chosen to give away those rights for free, to dispose of garbage generated by town businesses. Babylon's decision ... therefore constitutes municipal participation in the waste disposal market.

Id. at 1289.

b. Application to This Case

[12] *Babylon* is in diametric opposition to the facts presented in this case. Defendant claims that, like the contract in Babylon, the Ordinance would merely "eliminate[ ] the market for solid waste disposal." (Def.'s Br. 24.) Despite Defendant's contention otherwise, the market for solid waste disposal would continue to exist in Daviess County under the Ordinance, and Defendant would have a monopoly on that market. Here, Defendant would be forcing waste collectors to purchase its waste disposal services; Defendant would remain as the lone seller in this market as a result of its regulation. A market is where a seller sells goods or services, and a buyer buys goods or services. In *Babylon*, the contract between the town and the private contractor eliminated the waste collection market because the waste collectors no longer sold their services to commercial residents, and commercial residents no longer purchased these services from the waste collectors. Instead,

the town purchased these services and provided them for the benefit of its commercial residents, just as with countless other government benefits.

In this case, waste collectors would be purchasing waste disposal services from Defendant under the Ordinance, and Defendant would be selling waste disposal services to waste collectors. Thus, the proposition that the Ordinance would eliminate the market is absurd. The Ordinance would not eliminate the market; instead, it would make Defendant the only player in the market.

The waste disposal analogue to the waste collection system in *Babylon* would be if Defendant's waste disposal facility charged nothing for the disposal of waste generated within Daviess County, and then passed this cost on to its residents via taxes. If this were the case, then there would be no sale or purchase of waste disposal services, and thus there would be no market. If this were the case, then the system would not discriminate against interstate commerce. Unfortunately, this is not the system that would be implemented by the Ordinance.FN5

FN5. Defendant seems to place weight in the fact that it "purchased" the Daviess County landfill in that it invested public funds in its construction. Defendant then attempts to analogize this purchase to the purchase of disposal services made by the town in *Babylon*. This Court agrees that Defendant is a market participant in the sense that it operates the County landfill; however, this is irrelevant. The operation of the landfill is not the concern; the concern is the regulatory behavior as prescribed in the Ordinance that requires waste collectors to purchase the landfill's services. Unlike the town of Babylon, Defendant would not be acting only as a market participant; it would also be regulating the waste disposal market to benefit its participation.

Defendant relies on *Harvey & Harvey Inc. v. County of Chester* and *Houlton Citizens' Coalition v. Town of Houlton* for the proposition that a municipality could eliminate the market for waste services. Both cases are examples where the court endorsed the principle that a municipality's selection of a waste service provider (be it collection or disposal) does not run afoul of the dormant Commerce Clause if the selection process was open to in-state and out-of-state contractors, a process that was obviously different from the unilateral selection of Defendant's landfill as the sole waste disposal provider in this case. Harvey & Harvey, 68 F.3d 788, 802 (3d Cir.1995) (waste disposal); Houlton, 175 F.3d 178, 188 (1st Cir.1999) (waste collection and processing). Furthermore, neither of these cases turned on the elimination of a market: *Harvey & Harvey* is a case where the municipality designated waste disposal sites; it did not purchase waste disposal services on behalf of its citizens, so no market elimination occurred. 68 F.3d at 794-95. *Houlton* is a case where the municipality did purchase waste collection and processing services on behalf of its citizens; however, the First Circuit explicitly decided not to base its decision on the market elimination analysis of *Babylon*; instead, the court found that because the selection process for a waste collector and processor was competitive and open to out-of-state businesses, the measure was valid under the Commerce Clause. 175 F.3d at 187-89. These two cases do not support Defendant's position that the Ordinance would merely eliminate the waste disposal market in Daviess County.

D. THIS COURT DECLINES TO ADOPT THE SECOND CIRCUIT'S PUBLIC-PRIVATE OWNERSHIP DISTINCTION WITH RESPECT TO THE DORMANT COMMERCE CLAUSE

1. Standard of Review

The standard of review for the district court's grant of summary judgment is set out above.

2. Analysis

a. Legal Framework

In *United Haulers Assoc., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Authority,* the Second Circuit examined the constitutionality of a county ordinance that required waste collectors to dispose of solid waste at approved processing sites designated by the county. 261 F.3d 245, 249-50 (2d Cir.2001). The county owned all of the designated processing sites. *Id.* at 250.

In a surprising decision, the Second Circuit found that the ordinance did not discriminate against interstate commerce. The court drew a distinction between private ownership and public ownership: in a case where the regulation benefits a facility owned by the municipality, the regulation is nondiscriminatory. *Id.* at 263. The court based its decision first on the language of *Carbone.* The court noted that the facility in *Carbone* was privately owned. *Id.* at 259. The court also pointed to language that local governments " 'may not use their regulatory power to favor *local enterprise.*' " *Id.* at 258-59 (quoting *Carbone,* 511 U.S. at 394, 114 S.Ct. 1677) (emphasis in the original). Moreover, the court characterized the struggle between the majority, concurrence, and dissent in *Carbone* as one that wrestled with the question of "*whether* the favored facility was public or private." *Id.* at 259 (emphasis in the original). The concurrence and the dissent viewed the facility in *Carbone* as one that was publicly owned, so it was nondiscriminatory in that it discriminated equally against in-state and out-of-state facilities; the concurrence and the dissent then analyzed the regulation under the *Pike* balancing test. *Id.* (citing *Carbone,* 511 U.S. at 402-03, 114

S.Ct. 1677 (O'Connor, J., concurring); 511 U.S. at 410-30, 114 S.Ct. 1677 (Souter, J., dissenting)).

The court then examined the language of other dormant Commerce Clause cases, and it found that those cases were primarily concerned with the protection of local businesses at the expense of out-of-state businesses. *Id.* at 260-61.

The court found that, from a policy perspective, a local regulation that favored a local municipality, as opposed to local businesses, was less likely to be protectionist, and was less likely to engender negative reaction from neighboring areas. *Id.* at 261.

Having found that the ordinance did not discriminate against interstate commerce, the court remanded the case to the district court to conduct the *Pike* balancing. *Id.* at 263-64.

b. Application to This Case

This Court has already found dormant Commerce Clause violations in cases where the facility was publicly owned. *See Waste Mgmt.*, 130 F.3d at 736; *Huish Detergents*, 214 F.3d at 716. Those cases did not directly address the public-private ownership issue raised by *United Haulers;* however, an adoption by this Court of the public-private ownership distinction, as suggested by Defendant and *amici,* would amount to the overturning of our prior decisions, as a necessary implication of those decisions was that public ownership did not change the dormant Commerce Clause inquiry. This Court does not have the ability to take such action. *See LRL Properties v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1105 n. 2 (6th Cir.1995) ("It is well-settled law of this Circuit that a panel of this Court cannot overrule the decision of another panel." (internal quotations and citation omitted)).

Moreover, this Court respectfully disagrees with the Second

Circuit on the proposition that *Carbone* lends support for the public-private distinction drawn by that court. For every sentence in the decision that can be interpreted as supporting such a distinction, there is a sentence that can be interpreted in opposition. For example, the Court focused on the fact that "the ordinance prevents everyone except the favored local operator from performing the initial processing step. The ordinance thus deprives *out-of-state businesses of access to a local market.*" *Carbone*, 511 U.S. at 390, 114 S.Ct. 1677 (emphasis supplied). There, the focus of the court was on the harm to out-of-state businesses***911** and the local market, as opposed to the benefit conferred to the local provider. Importantly, this harm would occur regardless of who owned the benefitted facility. In further support that the focus of the dormant Commerce Clause inquiry was on the economic harm to out-of-state actors and the local market, the Court stated, "The *essential vice* in laws of this sort is that they bar the import of the processing service." *Id.* at 392, 114 S.Ct. 1677 (emphasis supplied). In other words, the crux of the inquiry is whether the local ordinance burdens interstate commerce, not whether the local entity benefitted by the ordinance is publicly owned.

Even in the language of the *United Haulers* decision itself, the court recognized this focus on the effects on foreign businesses by isolating the local market:

Our system, fostered by the Commerce Clause, is that every farmer and craftsmen shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them.

United Haulers, 261 F.3d at 254 (quoting *H.P. Hood & Sons*, 336 U.S. at 539, 69 S.Ct. 657). Free access for out-of-state businesses to the local market is "the rationale underlying the judicially created dormant Commerce Clause." *Id.*

In our view, the Second Circuit placed too much importance on phrases like "rival businesses" and "local enterprise" as used by the *Carbone* Court. *See id.* at 258-59. A municipality can be considered a local business in competition with out-of-state businesses, and a municipality can participate in local enterprise. While the Supreme Court expressed concerns of aiding local enterprise at the expense of rival businesses, these concerns remain regardless of whether the municipality owns the favored business.FN6

FN6. The Second Circuit also placed stock in the Supreme Court's use of the phrase "single local proprietor" in *Carbone* to support its public-private ownership distinction. *Id.* at 258. We fail to see the logical connection; a proprietor is defined simply as "[a]n owner, esp. one who runs a business." Black's Law Dictionary 1236 (7th ed.1999). There is absolutely no denotation that a proprietor can only be a private entity. Moreover, when the Supreme Court spoke of the "single local proprietor," its focus was on the harm to out-of-state competition:

The only conceivable distinction from [the cited dormant Commerce Clause cases] is that the flow control ordinance favors a single local provider. But this difference just makes the protectionist effect of the ordinance more acute. In *Dean Milk,* the local processing requirement at least permitted pasteurizers within five miles of the city to compete. An out-of-state pastuerizer who wanted access to that market might have built a pasteurizing facility within the radius. The flow control ordinance at issue here squelches competition in the waste-processing service altogether, leaving no room for investment from outside.

Carbone, 511 U.S. at 392, 114 S.Ct. 1677. The Supreme Court's concern about squelching competition altogether, leaving no room for outside investment, exists in the present case under the Ordinance; the fact that Defendant would be

the single local proprietor does not in any way mitigate this explicit harm.

This fact is implicit in the *Carbone* decision. We disagree with the Second Circuit that the point of contention in *Carbone* between the majority on the one hand, and the concurrence and the dissent on the other, was *whether* the waste transfer facility was public or private. Both the concurrence and the dissent agreed that because the waste transfer facility was publicly owned, it treated all other businesses, in-state and out-of-state, equally. *See supra.* The analysis of four Justices thus turned on the public-private distinction relied on by the Second Circuit; ***912** however, the majority's decision was not based on the categorization of the waste transfer facility as a private business.FN7

FN7. The Second Circuit considered it unclear whether the *Carbone* majority "either rejected or accepted the public/private distinction." *United Haulers,* 261 F.3d at 260. But not even the *Carbone* dissent was willing to adopt this view, though it had every incentive to do so. Had the dissent thought it plausible to read the majority's reasoning as consistent with the public-private distinction, it never would have characterized the majority as rejecting the distinction outright. *See Carbone,* 511 U.S. at 420, 114 S.Ct. 1677 (Souter, J., dissenting) ("The majority ignores this distinction between public and private enterprise."). The dissent thought that the public nature of the favored transfer facility rendered the ordinance to be non-discriminatory; it thus considered the public-private distinction of constitutional import. It makes no sense to suggest that the dissent, rather than characterizing the majority's holding narrowly, as concerning only private entities, would have broadened the majority's holding to reject a distinction that it itself advocated.

From the facts of *Carbone,* the waste transfer facility was

quite clearly owned in fact by the municipality. Though possessed and operated by the private contractor who built the facility for the first five years of operation, the entire arrangement between the county and the private contractor dealt only with the form of payment to the private contractor for building the transfer station for the town; there was no real doubt as to who actually owned the facility. Contrary to the declaration of the Second Circuit, the Supreme Court did not "repeatedly reference[ ] the private nature of the favored facility," *id.* at 258; in fact, the Court stated, "The object of this arrangement was to amortize the cost of the transfer station: The town would finance *its* new facility with the income generated by the tipping fees." *Carbone*, 511 U.S. at 387, 114 S.Ct. 1677 (emphasis supplied). At most, the private contractor was an agent of the town, collecting tipping fees on behalf of the town and then applying these fees to the construction costs that were not directly charged to the town because of the agreement.

Other language denoted an understanding by the majority that the facility was publicly owned: the Court's characterization of the "town-sponsored facility," the fact that "the flow control ordinance is a financing measure," the reference to the facility as "its [*i.e.*, the town's] project." *Id.* at 393-94. The majority did not find that the ordinance discriminated against interstate commerce because the waste transfer facility was privately owned, and we find that the Supreme Court implicitly rejected the public-private distinction.

The Second Circuit's interpretation of other dormant Commerce Clause cases was similarly strained. We assume the truth of the statement that "[t]he common thread in the Court's dormant Commerce Clause jurisprudence ... is that a local law discriminates against interstate commerce when it hoards local resources in a manner that favors local business, industry or investment over out-of-state competition." *United Haulers*, 261 F.3d at 261. But again, Daviess County is act-

ing as a local business in the local industry of waste disposal. Not to belabor the point, but under the Ordinance, Defendant would be acting in a dual role: as a local business selling waste disposal services, and as a local government hoarding "waste, and the demand to get rid of it, for the benefit" of this business. *Carbone*, 511 U.S. at 392, 114 S.Ct. 1677. The fact that Defendant acts as both a business and a government, as opposed to just a government, does not cloak its facially protectionist activity from the appropriate scrutiny under the Commerce Clause.

***913 III. CONCLUSION**

For the foregoing reasons, we **AFFIRM** the district court's order.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 04-6498

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION,
Plaintiff – Appellee,

v.

DAVIESS COUNTY, KENTUCKY,
Defendant – Appellant.

Before: CLAY AND COOK, Circuit Judges; COOK, District Judge.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Kentucky at Owensboro.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the order of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ **Leonard Green**
Leonard Green, Clerk

No. 04-6498

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL SOLID WASTES
MANAGEMENT ASSOCIATION,

Plaintiff – Appellee,

v.

O R D E R

DAVIESS COUNTY, KENTUCKY,

Defendant – Appellant.

Before: CLAY AND COOK, Circuit Judges; COOK, District Judge*

This matter comes before the court upon the petition of appellant Daviess County for rehearing of the decision of January 24, 2006, affirming the judgment of the district court. Upon consideration the petition is hereby denied.

ENTERED BY ORDER OF THE COURT
s/ **Leonard Green**
Leonard Green, Clerk

[1] The Honorable Julian Abele Cook, United States District Judge for the Eastern District of Michigan, sitting by designation.

United States Court of Appeals,Sixth Circuit.
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, Plaintiff-Appellee
v.
DAVIESS COUNTY, KENTUCKY, Defendant-Appellant.
No. 04-6498

March 30, 2006.

Before: CLAY and COOK, Circuit Judges; COOK, District Judge FN*.

FN* The Honorable Julian Abele Cook, United States District Judge for the Eastern District of Michigan, sitting by designation.

CLAY, Circuit Judge, concurring in the denial of the petition for rehearing.

This matter comes before the court upon the petition of appellant Daviess County for rehearing of the decision of January 24, 2006, affirming the judgment of the district court. Upon consideration the petition is hereby denied.

The unanimous opinion in this case makes unmistakably clear that Plaintiff established prudential standing under the Commerce Clause by alleging that the Ordinance would impair the right of its members to contract with out-of-state waste disposal providers. There simply is no ambiguity, misstatement, or oversight in this aspect of the opinion that would warrant the grant of the petition for rehearing.

The dissent to the denial of the petition for rehearing seems to believe that the Court should have expanded its analysis under prudential standing by examining whether out-of-state waste disposal providers charged lower prices, so as to establish downward price pressure on the in-state waste disposal market.

In taking up such a position, the dissent conflates the separate and distinct inquiries under constitutional and prudential standing. While its exact position is somewhat unclear, the dissent seems to assert that the "zone of interest" protected by the dormant Commerce Clause includes a party's ability to contract with out-of-state parties, but only when such contracting would lead to downward price pressure in the state. As the panel opinion amply demonstrates, this position is incorrect. The Commerce Clause prevents a state from erecting barriers to access to that state's markets, regardless of price pressure:

> Our system, fostered by the Commerce Clause, is that every farmer and craftsmen shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them.

H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 539, 69 S.Ct. 657, 93 L.Ed. 865 (1949). Nothing in the Constitution or Supreme Court jurisprudence remotely lends support to the notion that state regulation of commerce is impermissible, except when competition with other states would not lead to lower in-state prices. The focus is on discrimination against or burdens upon out-of-state goods or services: "We have interpreted the Commerce Clause to invalidate local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994). *See also Individuals for Responsible Gov't, Inc. v. Washoe County*, 110 F.3d 699, 703 (9th Cir.1997) ("The chief purpose underlying that Clause is to limit the power of the States to erect barriers against interstate trade." (internal quotation

marks and citation omitted).) The zone of interest of the dormant Commerce Clause is the prevention of state regulation of commerce, and this includes a state regulation that disallows an in-state party from contracting with out-of-state parties.

Indeed, in *Huish Detergents*, this Court, in its discussion of prudential standing, focused on the right to contract with out-of-state parties in general, not the right to contract with out-of-state parties that offer lower prices:

> Huish argues that it meets this [prudential] standing requirement because it has pleaded an injury that falls within the zone of interests protected by the Commerce Clause, and we agree. Huish seeks to protect its right to contract with a company that can transport its waste for out-of-state processing and/or disposal. In making this claim, Huish is asserting its individual right as a consumer to purchase waste processing and disposal services across State boundaries, an interest that falls squarely within the zone of interests protected by the Commerce Clause. The Clause protects not only producers, but also consumers like Huish who may look to the free competition from every producing area in the Nation to protect [it] from exploitation by any.

Huish Detergents, Inc. v. Warren County, 214 F.3d 707, 710 (6th Cir.2000) (second alteration in the original) (quotation marks and citation omitted). Not a single time did this Court mention "lower prices" or "price pressure" in discussing prudential standing, and for good reason; these concepts are relevant to constitutional standing, *i.e.*, whether a party suffers from an injury in fact, but they are irrelevant to prudential standing. Quite appropriately, the *Huish* panel discussed

lower prices in its analysis on constitutional standing and the ability to contract with out-of-state providers in its analysis of prudential standing, a structure that is echoed in the opinion in the instant case.

Of course, the Court must look at the same injury when determining whether a party has constitutional and prudential standing. For example, this Court could not assert jurisdiction over a claim where a party bases its constitutional standing on Injury 1 but its prudential standing on Injury 2. FN1 The point is that when the Court examines a party's injury, the Court looks to *different facets* of that injury in analyzing constitutional and prudential standing. In this case, Plaintiff claims that its members who collect waste within Daviess County would be disallowed by the Ordinance from contracting with lower price out-of-state waste disposal providers. The fact that these members are forced to pay higher prices demonstrates constitutional standing, while the fact that the regulation prevents contracting with out-of-state parties demonstrates prudential standing under the Commerce Clause. The dissent's assertion that the prudential standing analysis somehow envelopes the injury in fact requirement of constitutional standing plainly misses the mark.

FN1. Thus, under the analysis of the panel opinion, standing would *not* be conferred under the hypothetical, posited by the dissent, of a similar ordinance in a county in the middle of Texas. There, constitutional and prudential standing derive from different sources: constitutional standing is based on the inability to contract with lower price in-state but out-of-county waste disposal providers, whereas prudential standing is based on the inability to contract with out-of-state waste disposal providers. These are not different facets of the same injury but different injuries altogether.

Here, Plaintiff alleges the same underlying injury for both constitutional standing and prudential standing: the inability to contract with lower price out-of-state waste disposal providers. The dissent's belief that the panel opinion's analysis would find constitutional and prudential standing under the hypothetical is a misapprehension.

COOK, Circuit Judge, dissenting from the denial of rehearing. I respectfully dissent from the panel's decision to deny rehearing in this case. The Petition for Rehearing presented the first briefing to this panel on the issue of prudential standing. Prompted by that petition, I believe that we should "amend or supplement the original opinion to eliminate an ambiguity or correct a misstatement." Sixth Circuit Federal Practice Manual 141 (2d ed.1999).

Under the "zone of interests" prudential standing requirement, "a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Bennett v. Spear*, 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). That *same* grievance-or, as it is described later in *Bennett*, "the injury [the plaintiff] complains of," *Id.* at 176, 117 S.Ct. 1154 (citation and quotation marks removed)-provides the basis for Article III standing, and must satisfy the minimum standards of injury in fact, traceability, and redressibility. *Id.* at 167, 117 S.Ct. 1154 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). An "injury in fact [is] an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Id.*

I would amend the opinion to clarify that the injury in this case that falls within the dormant Commerce Clause's

"zone of interests" is not the mere impediment of "[NSWMA's] right to contract with an out-of-state waste disposal provider," as the panel suggests. *Opinion*, p. 649. Stated as such, the injury would not satisfy the *Article III* requirements that a plaintiff's injury be "concrete and particularized," "actual or imminent," and "not conjectural or hypothetical." *Bennett*, 520 U.S. at 167, 117 S.Ct. 1154. NSWMA has not alleged that any of its members have actually contracted with out-of-state disposal providers. The impediment of the ability of NSWMA's members to do so in the future *per se* is too attenuated to meet the constitutional standard.

We should explain instead that NSWMA has articulated a sufficiently immediate interest to satisfy both the prudential and constitutional requirements by alleging that competition between in-state and out-of-state waste disposal providers confers a *current* benefit (in the form of downward price pressure) on in-state waste collectors, particularly those that operate in a border county like Daviess. In *Huish Detergents Inc. v. Warren County*, we recognized the Constitutional value of that benefit, holding that the Commerce Clause protects the right of "consumers ... '[to] look to the free competition from every producing area in the Nation to protect [it] from exploitation by any.' " 214 F.3d 707, 711 (6th Cir.2000) (quoting *Dennis v. Higgins*, 498 U.S. 439, 450, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991)). Here, NSWMA alleged that the Ordinance prevents NSWMA waste collectors who collect waste within Daviess County-including Republic, which does both waste collection and disposal-from accessing the services offered by out-of-state waste disposal providers. The option of "look[ing] to" such out-of-state providers (on which the opinion focuses) is only constitutionally relevant because such out-of-state providers compete in what would be a

multi-state market but for the Ordinance.FN1 Because the Ordinance grants the Daviess County Landfill and Transfer Station a monopoly in that multi-state market, it creates a grievance that is sufficiently actual and immediate to satisfy both the prudential and constitutional requirements for standing.

FN1. The concurrence contends that we need only look to "*different facets* " of NSWMA's injuries. I take its point to be that if we describe NSWMA's injury simply as the inability to dump outside of Daviess County, then the injury-in-fact requirement would be met by the loss of cheaper in-state options, and the zone-of-interests requirement would be met by the loss of the opportunity to contract with out-of-state providers-regardless of whether that lost opportunity contributed to the plaintiff's injury-in-fact. Such a theory would require us to uphold standing in a case where a similar ordinance were imposed on a county in the very middle of Texas, even if the waste collectors there would never consider transporting the county's trash out-of-state (and thus only in-state disposal service providers would compete for the county's trash). I think it would be imprudent to uphold standing in that case, because I cannot see how such collectors would be injured by the inability to dump out-of-state. I do not see what stake such collectors would have in the court's determination of whether the ordinance impermissibly restricted interstate commerce, and thus I cannot see how they would be proper parties to pursue a claim that it did.

I concur with the opinion in all other respects.